Supreme Court, U.S.
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NO. 85-1906

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1985 TERM

ADELFINO ALANIZ, PETITIONER
v.
O. L. McCOTTER, DIRECTOR-
TEXAS DEPARTMENT OF CORRECTIONS,
RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ADELFINO ALANIZ Petitioner	§	
v	§	CIVIL ACTION No. C-84-222
R. K. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Defendant	§ §	

MEMORANDUM AND RECOMMENDATION

Petitioner, a state prisoner, raised one ground as a basis for Habeas Corpus relief in his Sec. 2254 Petition, i.e., that conviction was obtained by use of evidence gained pursuant to an unconstitutional search and seizure, where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim.

Petitioner is represented by counsel and the state court records have been filed.

The state trial court conducted a hearing on Petitioner's Motion to Suppress. Petitioner appealed his conviction and the state appeals court affirmed Petitioner's conviction. The findings of the state courts are presumed to be correct unless Petitioner can show, by a preponderance of the evidence, that one of the exceptions to this presumption apply herein. 28 U.S.C. Sec. 2254(d).

FINDINGS OF FACT

1. The findings of fact made by the state appeals court correctly reflect the factual background of the search and seizure complained of by Petitioner Alaniz v State, 647 S.W.2d 310 (Tex.App.--Corpus Christi 1982).

2. The Motion to Suppress Evidence filed by Petitioner's trial counsel, was based, in part, on the following ground:

"v. The search and seizure of the

foregoing matter was made without probable cause. Aguilar v Texas, 378 U.S. 106 (1964); Spinelli v United States 393 U.S. 410 (1968). Furthermore, the law enforcement officers, rather than immediately searching the vehicle without a warrant should have taken said vehicle before a magistrate to obtain a warrant to search the vehicle. Arkansas v Sanders, 99 S.Ct. 2568, 61 L.Ed.2d 253 (1979); United States v Chadwick, 433 U.S. 1 (1977)." Transcript from the 319th District Court, pp. 12-13.

3. At the hearing on the Motion to Suppress, Petitioner's counsel raised the absence of probable cause for the warrantless search of Petitioner's vehicle, and elicited testimony on the matter of exigent circumstances.

4. On appeal, Petitioner's counsel raised the issue of exigent circum-

stances, in addition to the issue of probable cause.

5. The state appellate court considered the matter of exigent circumstances and found, "(t)he trial court, by denying (Petitioner's) Motion to Suppress, found that the estimate (of the time it would have taken to obtain a search warrant) was reasonable and that procuring a warrant was impracticable." Alaniz v State, supra, at 314.

6. The state courts found Petitioner consented to the warrantless search of his auto. Alaniz v State, supra, at 314.

CONCLUSIONS OF LAW

1. Petitioner has not shown that any of the exceptions to the presumption that the state courts' findings of fact are correct apply herein and such findings are found to be correct. 28 U.S.C. Sec. 2254(d).

2. Although the Motion to Suppress did not explicitly raise the issue of exigent circumstances, the testimony elicited during the hearing on Petitioner's Motion to Suppress fully explored the circumstances that led the officers to search Petitioner's vehicle without a warrant.

3. Petitioner was provided an opportunity for full and fair litigation of his Fourth Amendment claim. Brantley v McKaskle, 722 F.2d 187 (5th Cir. 1984), citing Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 3052, 49 L.Ed.2d 1067 (1976).

4. If the state appellate court failed to consider Petitioner's contention of the officer's estimate of the time it would have taken to obtain a search warrant, it was because Petitioner defaulted procedurally in raising the issue in the trial court. No "cause" has been shown by Petitioner for this procedural de-

fault. Petitioner is thus barred from seeking federal habeas review of the issue of the officers estimate as it pertains to exigent circumstances. Weaver v McKaskle, 733 F.2d 1103 (5th Cir. 1984), citing Wainwright v Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

5. Even if the Court assumed that Petitioner was not given an opportunity to litigate the "exigency" issue of his Fourth Amendment claim, and considered this issue here, it would not avail Petitioner. "Practically speaking, when a vehicle is involved and probable cause to search exists, exigent circumstances usually are present." United States v Dunn, 674 F.2d 1093, 1101-1102 n.15 (5th Cir. 1982).

6. There is no merit to Petitioner's Sec. 2254 Petition.

7. Since the state court records are

available and the issue raised is fully covered in said records, there is no need for an evidentiary hearing. R.8(a), Rules Governing Section 2254 Cases in the United States District Courts.

RECOMMENDATION

This petition should be dismissed.

SIGNED this 25th day of February, 1985.

/s/ Eduardo E. de Ases
Eduardo E. de Ases
UNITED STATES MAGISTRATE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ADELFINO ALANIZ §

V. § C.A. NO. C-84-222

RAYMOND PROCUNIER, §
DIRECTOR OF TEXAS
DEPARTMENT OF
CORRECTIONS, ET AL. §

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION OF MAGISTRATE AND DISMISSING PETITION FOR HABEAS CORPUS

Together with the explanations discussed in this order, the Court adopts the Magistrate's Memorandum and Recommendation and dismisses the Petition for Habeas Corpus.

Petitioner Alaniz objects to the Magistrate's Finding of Fact No. 1 and Conclusion of Law No. 1. which deal with findings of fact by the state appellate court. Alaniz refers in particular to Officer Leal's testimony that obtaining a warrant could take up to an hour and a

half. Although the state appellate court relied on procedural grounds, the appellate court did uphold the trial court's determination that the estimate was reasonable.

Alaniz objects to the Magistrate's Finding of Fact No. 5 to the effect that the state appellate court considered the matter of exigent circumstances. The state appellate court did "consider" the issue of exigent circumstances to the extent that it rejected Alaniz's claim on procedural grounds. The appellate court specifically declined to address Alaniz's challenge to Officer Leal's estimate of one and one-half hours.

Alaniz objects to the Magistrate's Conclusion of Law No. 3, which asserts that Alaniz received an opportunity for full and fair consideration of his Fourth Amendment claim. See Stone v. Powell, 96

S. Ct. 3037 (1976). The Court upholds this conclusion by the Magistrate. The trial court held a hearing on the Motion to Suppress, and the state appellate court discussed the matter of exigent circumstances. The state appellate court refused on procedural grounds to address Alaniz's challenge to Officer Leal's estimate of one and one-half hours, which suffices under O'Berry v. Wainright, 546 F.2d 1204 (5th Cir. 1977), as "meaningful appellate review by a higher state court." The State of Texas has a legitimate interest in enforcing its procedural rules. See Zillender v. State, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977).

Alaniz objects to the Magistrate's Conclusion of Law No. 4, which asserts that the state appellate court declined to consider the issue of Officer Leal's

estimate because Petitioner defaulted procedurally when he failed to raise the issue in the trial court. The Magistrate simply describes the action of the appellate court. The Magistrate made reference to Wainright v. Sykes, 97 S. Ct. 2497 (1977), and determined that Alaniz failed to show cause for his procedural default. Alaniz argues that he only had to state a general Fourth Amendment objection because the Government bore the burden to show exigent circumstances.

The Court finds that Stone v. Powell, as explained by O'Berry v. Wainright, is dispositive of this case, so that the Court need not refer to the principles in Wainright v. Sykes. The Court does note that the factual situation in O'Berry resembles the factual situation in Wainright v. Sykes.

Alaniz objects to the Magistrate's

Finding of Fact No. 6, which asserts that the state courts found that Alaniz consented to the warrantless search of his automobile. A reading of the state court's opinion, Alaniz v. State, 647 S.W.2d 310, 314 (Tex. Ct. App. 1982), supports this finding.

Alaniz objects to the Magistrate's Conclusion of Law No. 5, which suggests that exigent circumstances existed because the search involved a vehicle. Under Stone v. Powell, the Court need not consider the merits of the Fourth Amendment claim.

Alaniz objects to the Magistrate's Conclusion of Law No. 6, which states that there is no merit to Petitioner's § 2254 petition. The Court upholds this determination by the Magistrate to the extent that Stone v. Powell precludes consideration of Alaniz's claims. The

Court accepts the recommendation of the Magistrate and dismisses this § 2254 petition.

ORDERED this 30th day of May, 1985.

/s/ Hayden W. Head, Jr.
HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE